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Supreme Court of the United States

OCTOBER TERM, 1906.

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No. 249.

GEORGE A. PETTIBONE, Appellant,

vs.

JASPER C. NICHOLS.

No. 250.

CHARLES H. MOYER, Appellant,

vs.

JASPER C. NICHOLS.

No. 251.

WILLIAM D. HAYWOOD, Appellant,

vs.

JASPER C. NICHOLS.

Brief and Argument for Respondent.

JAMES H. HAWLEY,
W. E. BORAH,
Counsel for Respondent.

(20,191, 20,192 and 20,193.)

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STATEMENT OF THE CASE.

The statement of the case made in the brief of appellants is in such form that it may possibly be misleading, and we believe it proper to restate the matter as part of respondent's brief.

As stated at page 2 of appellant's brief the appeals hereing are from orders denying relief under habeas corpus proceedings in the Circuit Court of the United States for

the District of Idaho; and as likewise stated in appellants' brief, a writ of error has been sued out by each of the appellants from this Court to the Supreme Court of Idaho from a judgment rendered in habeas corpus proceedings in that tribunal, and under the stipulation of the respective parties the cases here on writ of error being similar in all respects to the cases now being considered, are to be governed by the opinion of this Court in these cases.

The transcript of record in each of the cases on appeal from the United States Circuit Court for the District of Idaho, are similar in all essential particulars, and therefore, but one brief is filed, which applies to all of the cases.

The petition upon which application was made in behalf of each of the appellants for writs of habeas corpus are similar in all essential details, and are found in the transcript, pages 1 to 16, inclusive. Taking the statement in No. 249, we find the petition states in paragraphs A, B and C, page 1, that the petitioner, George A. Pettibone, is a resident and citizen of Colorado, and that on February 17th, 1906, had been a resident of said State for more than five years, and had not been in the State of Idaho for a period of more than ten years theretofore.

Paragraph D on the same page shows that on the 30th of December, 1905, Frank Steunenberg, a resident of the town of Caldwell in Canyon County, Idaho, came to his death by reason of the explosion of a bomb.

Paragraph E, page 2, discloses the fact that Owen M. Van Duyn, afterwards alleged to be the Prosecuting Attorney of said Canyon County, Idaho, on February 12th, 1906, swore to a complaint before the Probate Judge of said Canyon County, a copy of which is set forth, and is in the usual form, charging appellant with having ex-

ploded the bomb in question, thus causing the death of Mr. Steunenberg. A warrant of arrest was issued, and as set up in paragraph F, pages 2 and 3 of the record, command the arrest of the appellant Pettibone, the warrant being in the usual form. On the same day said Prosecuting Attorney applied for a requisition to be issued by the Governor of the State of Idaho to the Governor of the State of Colorado for the appellant Pettibone. This application is set up in full, is in the usual form, and is contained in paragraph G, pages 3 to 5 of the transcript.

On the same day Mr. Van Duyn prepared an affidavit in support of the application for the requisition, which is also set up in full on page 5 of the transcript, and is in the usual form.

Upon these papers the Governor of the State of Idaho demanded of the Governor of the State of Colorado the arrest of the appellant, said demand being in the usual form, and is found on page 6 of the transcript.

The petition then charges, in paragraph K, page 6, that in the above matters said Governor and said Prosecuting Attorney were counseled and advised by Attorney James H. Hawley of Boise City, Idaho, and that in all of said proceedings the said parties knew that the said petitioner was not in Idaho on December 30th, 1905. The petition then alleges (pp. 6 and 7) *upon information and belief of* the petitioner, that the parties mentioned conspired together to avoid the Constitution of the United States and the act of Congress made pursuant thereto, providing for the extradition of fugitives from justice; and further charges, that in pursuance of such conspiracy, the parties interested intending thereby to kidnap and forcibly take the body of the petitioner from the State of Colorado, and

remove it to the State of Idaho, procured the party named as agent for the State of Idaho, together with said Hawley, to go to Denver, in said State of Colorado, and that said Mills and said Hawley did so go to said City of Denver, and there enter into another conspiracy with the Governor of the State of Colorado, and others unknown, and in accordance with the terms of said conspiracy, caused the arrest of petitioner after business hours during the night of Saturday, February 17th (pp. 6 and 7 Trans.), and then proceeds to state that appellant Charles H. Moyer was arrested about 8:45 o'clock on the evening of said day, and appellant Haywood was also arrested about that time.

The petition then goes on to state (pp. 8 and 9, Trans.), upon the information and belief of appellant, that the arrests were made pursuant to the conspiracy between the Governor of Colorado and said Hawley and Mills, and the previous conspiracy of said parties with the Governor of Idaho, for the purpose of preventing the issuance of a writ of habeas corpus; and follows this statement up with an allegation that on the morning of the 18th of February, the appellant and the other parties named were taken from the said City of Denver on a special train, and removed to Boise City (p. 9).

Said petition then (pp. 10 to 17, inclusive.) treats of the application of appellant to the Supreme Court of the State of Idaho asking for writ of habeas corpus, and showing that the relief requested had been refused by that tribunal.

Upon this petition, writ of habeas corpus was issued from the United States Circuit Court (Trans. p. 16) directed to the respondent, who made return to the writ (Trans. pp. 18, 19 and 20). By stipulation of the parties

(Trans. p. 24) it was agreed that the petition of the appellant should be considered as his answer to the return. Thereupon, respondent moved to strike out the answer to the return upon the grounds that it was sham and irrelevant, and also demurred to the answer upon the grounds that it did not state facts sufficient to constitute a defense to the allegations made in the return (Trans. p. 25). After argument the Court sustained the position of respondent and struck out the answer to the return, sustained the demurrer and quashed the writ (p. 26).

Brief and Argument.

The statement made in the petition of appellant upon which the writ of habeas corpus was granted shows conclusively that in all matters pertaining to the extradition of appellant the usual forms of procedure were adopted. The contention of appellant, however, is that conceding the proceedings, both in the State of Idaho and in the State of Colorado, to have been regular, these proceedings were the result of a conspiracy between the Governors of the two States, the Prosecuting Attorney of Canyon County, and the other parties named and therefore should be voided. The petitions in each case are signed and verified by the appellants themselves. The allegations in regard to conspiracy and collusion are made upon information and belief. It will be conceded, we apprehend, upon the authorities cited by appellants in their brief, that without this charge of collusion and conspiracy, the proceedings being regular upon their face, and the appellants being in the custody of the authorities of the State of Idaho thereunder, the writ of habeas corpus was properly quashed by the Circuit Court. We submit that the

position of the appellants before the Courts is not strengthened in the slightest degree by reason of the allegations in the petitions in regard to conspiracy, collusion and fraud between the officers mentioned, and would not have been even if these had been positive averments, instead of being stated upon information and belief; such statements could not be regarded except as conclusions upon the part of the petitioners, and the courts in looking into the real facts of the case would not be influenced in the slightest degree by reason of such allegations, but would look to the facts themselves as shown by the record and then come to a conclusion unaided by any opinion or conclusion made by the petitioners as to whether or not a fraud had been perpetrated or the actions specified had been the result of collusion and conspiracy. We submit that the facts as shown in the record, divested of these oft repeated charges of collusion, conspiracy and fraud, do not warrant any conclusion upon the part of this or any Court that the officers charged with such serious offenses acted otherwise than in good faith and in the line of their official duty. What a flimsy showing it is upon which the Governors of two States of the Union are charged with a most serious offense—a conspiracy, with an attempt to deprive the petitioners of their legal rights, and to kidnap them from the State of Colorado and illegally bring them into the State of Idaho for the purpose of trying them for a capital offense.

The brief of the learned counsel for appellants argues apparently not the real facts as shown by the record, but the conclusions of their clients, which are made part of the record; and it is these charges of conspiracy and fraud upon which their entire argument is based. It is well,

therefore, at the inception of our argument, to review as briefly as possible the facts presented by the record and ascertain from those facts whether these serious charges against the officials named can be sustained and an inference even can be fairly drawn from those facts of wrong doing upon the part of either or any of them.

The complaints filed in the Probate Court of Canyon County, Idaho, charging each of the appellants with the murder of ex-Governor Steunenberg, are each in the due and usual form; the warrants issued thereon, and the affidavit of the Prosecuting Attorney, are in the same due form; every requirement of law was satisfied by the showing made to the Governor of the State of Idaho requesting him to make the demand upon the Governor of the State of Colorado for the appellants; upon such a showing the Governor of Idaho could not fail to act, as it was clearly his duty to comply with the request; he did nothing out of the usual and ordinary course of proceedure in such cases; he appointed an agent, as requested by the Prosecuting Attorney, as was his duty under the law, and that agent proceeded to the State of Colorado and made the necessary demand upon the Chief Executive of that State. Where in this record is there warrant for the conclusions of the appellants in their petitions, charging conspiracy and fraud upon the part of the Governor of Idaho? Where in this record is there justification for the contention made by the learned counsel for appellants that a conspiracy had been formed, and that by reason thereof the legal rights of their clients have been impaired?

These papers, in due form, were presented to the Governor of the State of Colorado, and he, according to the record itself, acted in the usual manner upon the presen-

tation of a request of this kind. We again ask in all seriousness, taking the facts of the record, and not the conclusions of appellants made upon information and belief, where is there any foundation for these charges of conspiracy and fraud upon the part of the Governor of the State of Colorado made by the appellants in their petitions and so often repeated by appellants' counsel in their brief? Reckless abuse of high officials made by interested counsel and based simply upon the opinions of persons charged with the most serious crimes, can, it strikes us, hardly be tolerated by the Courts; and we respectfully submit that counsel have overstepped the boundaries of propriety in assuming throughout in their brief that the Governors of these two States have in their actions in this regard been influenced by improper motives, and been guilty of criminal misconduct.

The only matter referred to in this regard that, to our minds, really demands consideration, are the complaints made before the Probate Judge charging appellants with the crime of murder, and the affidavit of Prosecuting Attorney Van Duyn accompanying these complaints, when the application was made to the Governor of Idaho asking him to demand the arrest of the appellants upon the charge made in the State of Colorado.

Section 7697 of the Revised Statutes of the State of Idaho reads as follows:

"The distinction between an accessory before the fact "and a principal, and between principals in the first and "second degree, in cases of felony, is abrogated; and all "persons concerned in the commission of a felony, whether "they directly commit the act constituting the offense "or aid and abet in its commission, though not present,

"shall hereafter be prosecuted, tried and punished as prin-
"cipals, and no other facts need be alleged in any indict-
"ment against such an accessory than are required in an
"indictment against his principal."

Section 7698 of said Revised Statutes reads as follows:

"An accessory to the commission of a felony may be in-
"dicted, tried and punished, though the principal may be
"neither indicted nor tried."

In Territory vs. Guthrie, 2 Idaho, 432, the Supreme Court of the Territory, passing upon the question of pleadings involved in a charge against a person who, under the common law would have been an accessory, expressly states that all persons aiding or abetting in the commission of an offense are treated as principals and should be prosecuted and punished as such. Under these statutes, and under the decisions in Idaho and the uniform practice there also, a party who had formerly been called an accessory, instead of being so charged, must be proceeded against as if he by his own hands had actually committed the offense. Under the form of pleadings as prepared, Mr. Van Duyn in swearing to the complaint and affidavit complained of in the petition, was within the law, acted under the statutes of Idaho, and made his charge in the manner prescribed thereby. Counsel for appellants in their brief choose to make a personal attack on Mr. Van Duyn and charge him with having committed perjury in making the affidavit complained of. They seemingly forget the definition of the crime of perjury, and that in order to be chargeable with such an offense the party charged must wilfully and contrary to his oath state as true any material matter which he knows to be false. How, in the face of these provisions of the

statutes and of the decisions in question, the learned counsel for appellants can excuse their unwarranted charge against a high public official charged with the prosecution of offenses within his district, is beyond our comprehension. If Mr. Van Duyn erred in this matter it is evident that he acted in good faith, and there are no extraneous matters alleged in the petition, or even hinted at, that would justify the charge made against him.

While we have devoted considerable space to the discussion of these matters of good faith upon the part of the officers attacked in the petitions in question, and in the brief of counsel for appellants, we have done so for the reason that we could not permit to go unchallenged statements charging these gentlemen with dereliction of official duty and with the commission of offenses, which, if proven, would consign them to terms of imprisonment. The legal propositions before the Court do not, in our judgment, depend in the slightest degree upon the questions of wrong doing on the part of the officers entrusted with the execution of the laws of the State of Idaho or of Colorado. In view of the decision cited herein by appellants themselves, we are constrained to believe that in the absence of these charges of wrong doing, that they would hardly be before this Court asking for a reversal of the decision of the Circuit Court. We urge that these decisions cited by counsel, and commented upon by them, would, without question, show the fallacy of their position taken, if it were not for the extraordinary charges they have seen fit to make in connection with the officers of the two States mentioned. A number of other assertions made in the answer to the return that have been commented upon by the learned counsel for appellants and will un-

doubtedly be referred to in their oral argument. It is charged that a special train was provided for taking the petitioners from the State of Colorado; that they were only retained a few hours in that State after their arrest. We ask in all seriousness what figure does that cut? By virtue of what statute or provision of law is a person who becomes legally the custodian of another charged with crime compelled to wait any certain or definite length of time before proceeding with his prisoner to the place wherein the crime is charged against him? Is it the duty of the arresting officer to make public, to shout from the house tops, the fact that he had made the arrest or proclaim the matter in the public press? To so arrange things that possibly weeks would elapse before he be permitted to take his prisoner to the jurisdiction wherein he is charged? What legitimate complaint, we urge in all seriousness, can be based upon the proceedings as stated in the answer to the return? It is charged that these parties were retained only a few hours in the State of Colorado after their arrest for the purpose of preventing the issuance of a writ of habeas corpus. This, however, is simply a conclusion, not the statement of a fact. If it was alleged in the answer to the return that the appellants, or either of them, had asked permission to see counsel and been refused that permission, there might be some legitimate grounds of complaint of ill usage, but under the circumstances, we submit, there is nothing to justify the assertions of counsel in their brief upon these matters.

The learned counsel for appellant carefully, and, it would seem, designedly, state in a number of places in their brief that the respondent admits all of the allegations made in the petition herein. It is true that a de-

murrer, as well as a motion to strike, was made by respondent in the court below and sustained by the Court. The demurrer, perhaps, was unnecessary, as the motion to strike was really the important matter, and upon its being granted would have caused the writ to be quashed, even if a demurrer had not been filed. Counsel say at page 13 of their brief, "The demurrer filed in the Circuit Court admits absolutely and without equivocation the charge in its entirety," the charge being the malfeasance of the executives of the States of Colorado and Idaho. We insist that the demurrer does not so admit. A demurrer is simply an allegation that, admitting the facts of the preceding pleading to be true as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the Court to proceed further.

Reid vs. Field, 83 Va. 26.

It raises an issue not of fact, but of law, and is a formal mode of disputing the sufficiency in law of the pleadings of the other side; but when a demurrer admits all the allegations, it admits nothing but what is material and well pleaded; moreover, a demurrer is only a technical admission, and does not involve any confession. Conclusions of law are never admitted.

Dennison Manu. Co. vs. Thomas Manu. Co. 94 Fed. 651.

The petitions herein were seemingly drawn upon the assumption that appellants were held by respondent by virtue of the process mentioned issued from the Probate Court of Canyon County. The return, however, shows (Trans. p. 19) that the appellants were being held by

reason of a bench warrant issued on March 9th, 1906, and served upon appellants on that day, which bench warrants was based on an indictment by the Grand Jury of said Canyon County presented to the Court on March 7th, 1906. This part of the return was not challenged by appellants in their answers, and stands therefore as a conceded fact. We urge, therefore, that even if the appellants could have been granted relief from the original arrest, they could not urge the matters complained of in the petitions against their detention under the bench warrent mentioned.

Suppose, for argument's sake, they had been discharged under the habeas corpus proceedings in the Supreme Court of Idaho, this assuredly would not have been a bar to their again being arrested under an indictment found the day after. And we urge that in the event of the matters stated in the petitions being considered sufficient to cause the discharge of appellants from custody upon the warrants issued from said Probate Court, still it does not follow they could have been successfully urged in a new proceeding seeking their discharge from arrest under the bench warrant based on the indictment. As stated by Mr. Justice Storey, in ex parte Milburn, 9 Peters, 704:

"A discharge of a party under a writ of habeas corpus "from the process under which he is imprisoned, discharges "him from any further confinement under the process, but "not under any other process which may be issued against "him under the same indictment."

If this is correct, the rule would apply with intensified force where the release was from a warrant based on a complaint before a committing magistrate merely, and an indictment was afterwards found.

While we do not concede that the procedure, or any part

of it, surrounding the arrest of appellants in Colorado and their taking to Idaho was illegal in any way, and while on the contrary we urge that every step taken in the matters complained of was strictly in accordance with law, still we will assume for argument's sake that the procedure was unlawful, and then consider the next question that would necessarily arise—

What is the effect of an unlawful or unjustifiable taking of a person charged with crime from the State wherein he lives or has found refuge?

There is no right of asylum in a sister State by one who commits a crime against the laws of a State either while personally on its soil or while in a foreign jurisdiction and acting through some other agency or medium.

Mahon vs. Justice, 127 U. S. at page 715.
Lascelles vs. Georgia, 148 U. S. 543.
Ker vs. Illinois, 119 U. S. 436.
In re Moore, 75 Fed. Rep. 824.

Mahon vs. Justice, *supra,* was a controversy between the States of West Virginia and Kentucky over the kidnaping of Mahon from West Virginia and his forcible taking into Kentucky for trial. The first State mentioned was aggrieved by this action and through its Governor inaugurated the proceeding. In the cases under consideration here we should constantly bear in mind that there is no question between the two State affected, and the only complaint comes from the persons extradited.

Mr. Justice Field, who delivered the opinion, in commencing his decision, says:

"The Governor of West Virginia, in his application on "behalf of the State for writ of habeas corpus to obtain

"the discharge of Mahon and his return to that State, pro-
"ceeded upon the theory that it was the duty of the United
"States to secure the inviolability of the territory of the
"State from the lawless invasion of persons from other
"States, and when parties had been forcibly taken from
"her territory and jurisdiction to afford the means of
"compelling their return; and that this obligation could
"be enforced by means of the writ of habeas corpus as the
"Court in discharging the party abducted could also di-
"rect his return to the State from which he was taken or
"his delivery to persons who would see that its order in
"that respect was carried out."

And after having made the statement of the controversy the learned justice says:

"The only question, therefore, presented for our determi-
"nation is whether a person indicted for a felony in one
"State, forcibly abducted from another State and brought
"to the State where he was indicted, by parties acting
"without warrant or authority of law, is entitled under
"the Constitution or laws of the United States, to release
"from detention under the indictment by reason of such
"forcible and unlawful abduction. Section 753 of the Re-
"vised Statutes declares that 'the writ of habeas corpus
"shall in no case extend to a prisoner in jail, unless where
"he is in custody under or by color of the authority of
"the United States, or is committed for trial before some
"court thereof; or is in custody for an act done or omitted
"in pursuance of a law of the United States, or of an order,
"process, or decree of a court or judge thereof; or is in
"custody in violation of the Constitution, or of a law or
"treaty of the United States.'"

* * * * * * *

"As to the removal from the State of the fugitive from "justice in a way other than that which is provided by "the second section of the fourth article of the Constitu- "tion, which declares that 'a person charged in any State "with treason, felony, or other crime, who shall flee from "justice, and be found in another State, shall, on demand "of the executive authority of the State from which he fled, "be delivered up, to be removed to the State having juris- "diction of the crime,' and the laws passed by Congress to "carry the same into effect—it is not perceived how that "fact can affect his detention upon a warrant for the "commission of a crime within the State to which he is "carried. The jurisdiction of the Court in which the in- "dictment is found is not impaired by the manner in "which the accused is brought before it. There are many "adjudications to this purport cited by counsel on the "argument to some of which we will refer."

And the distinguished jurist concludes his opinion by saying:

"So in this case, it is contended that, because under the "Constitution and laws of the United States a fugitive "from justice from one State to another can be sur- "rendered to the State where the crime was committed, "upon proper proceedings taken, he has the right of asy- "lum in the State to which he has fled, unless removed in "conformity with such proceedings, and that this right "can be enforced in the courts of the United States. But "the plain answer to this contention is that the laws of "the United States do not recognize any such right of asy- "lum, as is here claimed, or the right of the fugitive from "justice in any State to which he has fled; nor have they, "as already stated, made any provision for the return of

"parties who, by violence and without lawful authority, "have been abducted from a State. There is, therefore, no "authority in the Courts of the United States to act upon "any such alleged rights. In Ker vs. Illinois the Court "said that the question of how far the forcible seizure of "the defendant in another country, and his conveyance by "violence, force or fraud to this country could be made "available to resist trial in the State Court for the offense "charged upon him, was one which it did not feel called "upon to decide, for in that transaction it did not see that "the Constitution, or laws, or treaties of the United States "guaranteed to him any protection. So in this case we "say that, whatever effect may be given by the State Court "to the illegal mode in which the defendant was brought "from another State, no right, secured under the Consti- "tution or laws of the United States, was violated by his "arrest in Kentucky, and imprisonment there, upon the in- "dictments found against him for murder in that State."

Justice Bradley dissented from the above opinion on the ground that the restoration of Mahon had been demanded by West Virginia, saying:

"He is not in the situation of a criminal who has been "abducted from a State which takes no interest in his "case."

So it is to be noted that in this particular case, at bar that Colorado, in contradistinction to West Virginia, not only does *not* demand restoration of the defendants, not only *"takes no interest"* in their restoration, but, as the record shows, acquiesces in their removal to Idaho by the express and overt act of honoring the requisition of the Governor of Idaho and issuing the warrant of arrest thereon.

In Ker vs. Illinois, 119 U. S. 436, the petitioner had

pleaded in abatement to an indictment for larceny in the Criminal Court of Cook County, that he had been kidnaped from the City of Lima, in Peru, forcibly placed on a vessel of the United States in the harbor of Callao, carried to San Francisco and sent from there to Illinois upon a requisition made upon the Governor of California. After disposing of the point that he had not been deprived of his liberty without "due process of law," the Court intimated in reply to an objection that the petitioner was not a fugitive from justice in the State of California, that "when the Governor of one State voluntarily surrnders a "fugitive from justice of another State to answer for his al- "leged offenses, it is hardly a proper subject of inquiry on "the trial of the case to examine into the details of the pro- "ceedings by which the demand was made by the one State "and the manner in which it was responded to by the other. "* * * The question of how far his forcible seizure in an- "other country and transfer by violence, force or fraud to "this country, could be made available to resist trial in "the State Court for the offense now charged upon him, is "one we do not feel called upon to decide, for in that trans- "action we do not see that the Constitution or laws or "treaties of the United States guarantee him any protec- "tion. There are authorities of the highest respectability "which hold that such forcible abduction is no sufficient "reason why the party should not answer when brought "within the jurisdiction of the Court which has the right "to try him for such an offense. * * * *However this may "be, the decision of that question is as much within the "province of the State Court as a question of common law, "or of the law of nations, of which that Court is bound to "take notice, as it is of the courts of the United States."*

Opinion of Justice Brown in Cook vs. Hart, 146 U. S. 186, commenting on the case of Ker vs. Illinois, cites the above quotation with approval.

These cases (Ker vs. Illinois and Mahon vs. Justice, *supra*,) may be considered as establishing two propositions: 1. That this Court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another, where they are held under process legally issued from the courts of the latter State. 2. That the question of the applicability of this doctrine to a particular case is as much within the province of a State Court as a question of common law or of the law of nations, as it is of the Courts of the United States.

In re Cook, 49 Fed. Rep. 833, the question under consideration was the validity of an extradition that had been granted, although the person against whom it was directed was not at the time of the commission of the offense in the demanding State. The validity of the warrant issued by the Governor of the demanding State became a matter of importance and Judge Jenkins, at pages 840 and 841, says:

"We are of opinion, that the contention in behalf of pe-
"titioner can not be sustained. The vice of this position is
"in the assumption that the fact of flight is jurisdictional,
"in the sense that executive action is void if, in point of
"fact, the demanded person be not a fugitive from justice.
"The power to act upon a given state of facts, and to de-
"cide whether that state of facts exists, constitutes juris-
"diction. The decision therein is conclusive until prop-
"erly set aside. The Constitution and the Act of Con-
"gress have lodged with the executive of the State upon

"whom proper demand is made for one alleged to be a "fugitive from justice the jurisdiction to determine wheth- "er the person so charged be such fugitive, and his determ- "ination is sufficient to justify the surrender. He has, by "virtue of the law and of the action of the executive of "the demanding State, jurisdiction of the subject matter. "He has jurisdiction of the person of the petitioner by "virtue of his presence within the State. His determina- "tion partakes of the nature of a judicial proceeding. It "is true, his action is ex parte. Therefore, it is that the "courts will review his determination. But that fact is "not availing to destroy jurisdiction. He may err, but— "to use the expression of Chief Justice Ryan—he had " 'jurisdiction to commit the error.' His determination of "the fact of flight, evidenced by the issuing of his warrant, "suffices to justify the removal until the presumption in "its favor is overthrown by contrary proof in a proper pro- "ceeding. (Roberts vs. Reilly, 116 U. S. 80-95, 6 Sup. Ct. "Rep. 291.) His warrant, unassailed by competent au- "thority, is complete justification for the arrest and sur- "render of the alleged fugitive. Where so delivered by "virtue of such warrant, his surrender is lawful, and the "demanding State obtains rightful possession of his per- "son, and may lawfully subject him to its crimnial pro- "cess for the offense charged. The executive warrant has "then spent its force. It is no longer operative. The al- "leged offender is no longer subjected to deprivation of "liberty by virtue thereof, but is rightfully held under the "process of the State. When that has happened, no fed- "eral question remains. If the fact of flight be jurisdic- "tional in the sense that it must exist as essential to the "validity of any action by the executive, then it always

"must remain open to inquiry as well after surrender as "before; as well after trial and conviction as before; as "well after sentence as before; as well during imprison- "ment upon conviction and sentence as before surrender "and trial, for the reason that upon such postulate the "executive would not have jurisdiction because he so de- "termined; and any inquiry by habeas corpus—the only "means of review of his decision—would not bar another "writ. In such case, also, the officer executing the warrant "of the executive would not be justified by the writ, but "by the jurisdictional fact of flight upon which the writ "is predicated, and which, if the jurisdiction did not exist "would be mere waste paper. Such confusion, necessarily "resulting from such holding, is not to be lightly enter- "tained. It can not be assumed that any such meaning of "the constitutional provision or the act of Congress was "possible to the minds of the framers. The fact of flight "may be in a sense jurisdictional to removal, as one says "a criminal court has jurisdiction only of crime. But such "court has jurisdiction to determine whether a certain act "charged to have been committed is or is not a crime. It's "decision therein, although erroneous, is not void. So "here, the jurisdiction to determine the fact of flight is "lodged with the executive. He has jurisdicton of the "subject matter. His warrant is valid until his determi- "nation of the fact of flight is properly reversed. When, "therefore, such valid warrant has been executed, the sur- "render thereunder is lawful, and the party lawfully sub- "jected to the State jurisdiction."

The case was appealed to this Court and entitled Cook vs. Hart, 146 U. S. 183. The decision of the lower Court was affirmed, and Mr. Justice Brown, delivering the opin-

ion of the Court, in referring to the very question which is involved here, the right of the extradited person to ask relief in the courts of the demanding State, says:

"It is proper to observe in this connection, that assum-"ing the question of flight to be jurisdictional, *if that* "*question be raised before the executive or the courts of* "*the surrendering State,* it is presented in a very different "aspect after the accused has been delivered over to the "agent of the demanding State, *and has actually entered* "*the territory of that State and is held under the process* "*of its courts.*"

To the same effect is ex parte Johnson, 167 U. S. 120, where the distinction between service of civil process and criminal process upon persons unlawfully brought into the jurisdiction was being considered, and the following language used in reference thereto:

"There are many authorities which go to the extent of "holding that in criminal cases a forcible abduction is no "sufficient reason why the party should not answer when "brought within the jurisdiction of the Court which has "the right to try him for such an offense and presents no "valid objection to his trial in such court. * * * The law "will not permit a person to be kidnaped or decoyed with-"in the jurisdiction *for the purpose of being compelled* "*to answer to a mere private claim,* but in criminal cases "the interests of the public override that which is, after "all, *a mere privilege from arrest.*"

Upon the authority of these decisions and the others hereinafter cited we urge that the question as to how the accused person has come within the State wherein the crime was committed can not be inquired into by the courts of such State. It is not a cause of exemption from

prosecution for a crime that the accused was illegally arrested or unlawfully brought within the jurisdiction.

13 Cyc. Law & Pro. 99.
12 Ency. of Law, 607.
Church on Habeas Corpus, 461.
Cook vs. Hart, 146 U. S. 708.
Ex parte Ker, 18 Fed. 167.
Ex parte Baker, 13 Am. St. 17.
State vs. Smith, 19 Am. Dec. 679.
State vs. Ross, 21 Iowa, 467.
Dow's Case, 18 Pa. St. 37.

All of the above cases are direct and certain, leave no room for doubt as to the law, and completely destroy the appellants' chances for relief in this proceeding .

What necessarily follows? The parties are in Idaho; the reasons for their being there are not legitimate subjects of inquiry in this proceeding, and if they were, the proceedings are absolutely regular on their face; the questions of good faith on the part of the officers, of collusion, of conspiracy, can not be inquired into; what is proposed to be done? What relief can be extended? Is it expected this Court can put the defendant in statu quo? Will it be urged that this Court can order these appellants to be taken back to Colorado, and there thresh out the question of extradition? They were brought to Idaho on the strength of complaints before the Probate Court of Canyon County charging them with murder; they are held now, not upon such complaints, but upon indictment found after they were taken to Idaho and upon which they were taken into custody. (Trans. p. 19.)

No case is here presented that can be properly said to

come within the exception to the prohibition contained in Section 753 of the Revised Statutes of the United States, or which will authorize the issuance of the writ by a United States Court.

Ker vs. Illinois, 119 U. S. 436-442,444 (30, 421-424.)
State vs. Brewster, 7 Vt. 118.
Dow's Case, 18 Pa. 37.
Re Miles, 52 Vt. 609.
Mahon vs. Justice, 127 U. S. 707-712 (32, 285-287).
Re Mahon, 34 Fed. 525-528-531.

There is no limitation or restriction upon the crime for which a man may be extradited in interstate extradition; that duty is equally imperative as to all crimes, and *no right of return is provided for or necessarily implied.*

2 Moore Extradition, Secs. 643-644.
Re Noyes, 17 Alb. L. J. 407.
Ham vs. State, 4 Tex. App. 645.
Harland vs. Washington, 3 Wash. Terr. 153.
Dow's Case, 18 Pa. 39.
State vs. Stewart, 60 Wis. 587; 50 Am. Rep. 388.
Ex parte Barker, 87 Ala. 4.
William vs. Weber, 1 Colo. App. 191.
State vs. Brewster, 7 Vt. 120.
Adriance vs. La Grave, 59 N. Y. 110; 17 Am. Rep. 317.
U. S. vs. Caldwell, 8 Blatchf. 133.
U. S. vs. Lawrence, 13 Blatchf. 299-307.
Peo. vs. Rowe, 4 Park. Crim. Rep. 253.
Re Miles, 52 Vt. 609.
Mahon vs. Justice, 127 U. S. 700.

We also desire to call the attention of this Court, upon all the points argued herein, to the well considered opinion of the Supreme Court of Idaho in re Charles H. Moyer, printed in the appendix to appellants' brief, commencing at page 58 thereof.

The Court will not inquire into the legality of arrest. That the accused is in court is sufficient to require him to answer the indictment against him.

Am. & Eng. Ency. of Law, Vol. 12, page 598.
Ex parte Scott, 9 B. & C. 446; 17 E. L. C. 416.
Ker vs. Illinois, 119 U. S. 436-442-444 (30, 421-424).
State vs. Kealy, 89 Iowa, 94.
State vs. Patterson, 110 Mo. 505.
Mahon vs. Justice, 127 U. S. 700.
State vs. Smith, 1 Bailey L. (S. Car.), 283; 19 Am. Dec. 679.
Matter of Noyes, 17 Alb. L. J. 407.
Ex parte Barker, 87 Ala. 4; 13 Am. St. Rep. 17.
State vs. Ross, 21 Iowa, 467.
Dow's Case, 18 Pa. St. 37.

From the authorities cited we must conclude, irrespective of the methods pursued in securing the person wanted that after the requisition has been honored, and the prisoner is within the jurisdiction of the demanding State, complaint comes too late when relief is asked for in the courts of the demanding State questioning the regularity of the proceedings.

Mahon vs. Justice, *supra*.

And when that has happened no Federal question remains.

In re Cook, 49 Fed. 841.

Further approved of in Cook vs. Hart, 146 U. S. 163; 36 L. Ed.

What would be the effect if the charges of the appellants were conceded to be true and the Governors of both Idaho and Colorado had violated the law?

The contention of appellants is that these cases are *sui generis;* that in no other cases that can be called to the attention of the Court has the unwarranted removal of the accused from the State wherein he was found been effected by reason of the officers intrusted with the execution of the laws having acted in an unlawful or improper manner; and that the decisions holding that the kidnaping of a person charged with crime and his forcible removal to the State wherein the crime is alleged to have been committed do not apply where the executive officers of either of the States affected are parties to the unlawful removal.

Such position becomes necessary in view of the decisions of this Court in Ker vs. Illinois, *supra,* and Mahon vs. Justice, *supra,* but can not be maintained successfully. The attempt to distinguish these cases from the two cases mentioned is based upon the fact that in both of the cases cited the accused persons were brought within the jurisdiction of the trial State by persons who had kidnaped them and forcibly abducted them without process from the State where they were found, and that the trial State had not acted as in these cases, under legal process, or been in any way a party to the abduction; that the two cases cited involved matters of tort for which the injured parties could sue the tort-feasors, while in these cases the officers charged with wrong doing were acting under and by virtue of an act of Congress but intentionally violating both the letter and spirit of the act.

We can not understand the difference in principle between cases of kidnaping by unauthorized persons and cases wherein the extradition is conducted under the forms of law but through mistake or intentionally the Governor of either the demanding or surrendering State has failed in his duty. The Governor upon whom the demand is made must determine for himself, in the first instance, whether the demanded person is a fugitive from justice.

Ex parte Reggel, 114 U. S. 642.
Roberts vs. Reilley, 116 U. S. 80.

And then, if the request of the demanding State is granted, the accused person can appeal to the courts of such State for protection and relief; but we fail to find any expression in any opinion of this Court wherein the right is given him to object to being further held after he has been taken to the demanding State.

The fact of the Governor of either State having acted wrongfully or in collusion would, we urge, cut no figure whatsoever.

In the case of People vs. Pratt, 78 California, 349, the Governor of that State was charged with official wrong doing in connection with the extradition of a person charged with crime in that State, but who was at the time in Japan. The Supreme Court of that State, in passing upon the matter, said:

"The arguments of the defendant to the effect that the "State is bound in law and good morals to have this de-"fendant released, and that her Courts should so hold, "strikes us as being without force. The Governor evident-"ly actuated by the motive that one charged with a high

"crime should have meted out to him just punishment, "may have taken steps to bring him before the bar of a "court of justice having jurisdiction of the offense which "are not warranted by law, *but that is a matter personal "to the Governor with which neither the commonwealth "nor the courts have any concern.*"

We urge that the reasoning in the California case applies directly here, and the decision cited fully answers the contention of appellants in this regard.

Counsel for appellants in their brief make extended comment upon the decisions of this Court in People vs. Hyatt, 188 U. S. 691, and Munsey vs. Cluff, 196 U. S. 364, and claim these cases are in point, and sustain their contention. Such is not the case. In each of those cases the party demanded commenced habeas corpus proceedings in the surrendering State, and in neither of those cases was the person charged with crime taken to the demanding State. Such being the case, it necessarily followed that the persons charged could interpose the fact that they were not in the demanding State at the time of the commission of the offense, or any other defense they might see fit to urge, and the courts of the surrendering State would be privileged, in fact, it would be their duty, to consider such defense. These decisions, however, ceased to be authority, as we understand them, so far as the cases at bar are concerned, by reason of the fact that the writ was invoked in the surrendering State, instead of the demanding State. Ex parte Reggel, 114 U. S. 642, and a number of the authorities cited by the learned counsel, are also based on a state of affairs similar to those existing in People vs. Hyatt, and Munsey vs. Cluff, *supra,* and, therefore, cease

to be authority so far as the real points in this controversy are concerned.

In fact, the underlying theory in most of the cases wherein proceedings have been commenced looking to release in the demanding State of a person charged with crime, forcibly taken there without process, seem to be, that the party charged has no remedy, but that the State from which the party charged has been taken alone has cause of complaint. It is the indignity put upon the State, not the outrage upon the individual, that can be successfully urged in legal proceedings; and, as we take it, no injustice by reason of such being the law would be worked upon any individual; if a person innocent of crime is forcibly abducted from one State and taken to another and there tried, his innocence will be established at such trial, and he will have his right of action against those engaged in the abduction, and could also invoke the criminal law of the State from whence he was taken for the punishment of those who had abducted him. Thus the rights of an innocent man who had been mistreated in such manner would be protected and those who had worked the injury upon him would be properly punished. If, on the contrary, the person abducted when brought to trial was proven guilty, there surely would be little opportunity of urging that he had been mistreated, and no right-minded person would, we opine, feel any particular sympathy with the criminal by reason of the methods used in bringing him to the bar of justice. The criminal would have no cause of complaint in such case, because the injustice done him was caused by his own act in committing the crime charged; the primary object of the law in such cases being to punish those guilty of public offenses, the

metod of bringing them to the place of trial would cut no material figure in regard to the real question involved—that of the guilt or innocence of the accused; and while even a guilty man might under such circumstances be privileged to invoke the civil law, and mulct his abductors in damages, and while such abductors could be punished in criminal actions in the State in which the abduction was made, still, such abduction would not, under any circumstances, as we view it in the light of the decisions, be a defense that could be interposed in behalf of the person taken; nor could it be used as a shield to be interposed between a guilty person so charged, and the punishment which his crime made proper to be inflicted upon him.

In such a case it is not, as we take it from the decisions, an invasion of the rights of the individual that is the important point, because the individual has his remedy; but it is the indignity put upon the State from which he was taken that is the important matter. It surely would be impossible for any right-minded person to waste much sympathy upon a man convicted of a serious offense against the laws by reason of the fact that the officers of the law had adopted extraordinary or even unlawful methods in bringing him before the courts of justice.

Counsel for appellants seem to realize that an abduction by a private individual can not be urged in the State to which he is taken as a ground for the release of the person charged, but endeavor to draw a distinction between cases where a party has been abducted or kidnaped by private individuals and one where he has been unlawfully taken from the surrendering State by reason of the unlawful acts of officers entrusted with the execution of the law. No such distinction, we urge, can be drawn. The State can

not be made responsible for the unlawful acts of its officers in such case. As was said in People vs. Pratt, *supra*, such act "is a matter personal to the Governor, with which neither the commonwealth nor the courts have any concern." In other words, as we take it, the Governor of a State who unlawfully engages in the abduction or forcible removal of persons charged with crime, either from his State or to his State, would, like any other individual, be responsible in damages to the party injured, but his unlawful action would in nowise be binding upon the State, nor could any other relief be extended to the person abducted, because he as Governor engaged in an unlawful enterprise, than would be granted if the acts of such executive were done by a private person.

Having, we believe, fully answered all of the material matters urged in appellants' brief, and shown that there is nothing in these cases before the Court that should cause this Court to depart from the well established rules governing cases of this kind, we ask that the action of the Supreme Court of the State of Idaho, and of the Circuit Court of the United States for the District of Idaho be sustained, and that the asked for relief be refused.

Respectfully submitted,

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